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NO. 80-609

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOAN M. JOHNSON,

Petitioner,

vs.

NORDSTROM-LARPENTEUR AGENCY, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

STATEMENT OF THE CASE

Petitioner's statement of the case unduly complicates and distorts the pertinent facts in an apparent effort to create new legal issues cognizable under Rule 17 of the Rules of this Court. The operative facts, detailed in the District Court's findings and reviewed and affirmed by the Eighth Circuit under the clearly erroneous standard,[1] can be briefly summarized.

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[1]The District Court's decision, *Johnson v. Nordstrom-Larpenteur Agency, Inc.*, 23 F.E.P. Cases 274 (D. Minn. 1979), incorporates detailed findings and then applies clearly established and uniformly interpreted Equal Pay Act and Title VII law in reaching its conclusions. The Eighth Circuit held that the District Court's findings are not clearly erroneous. *Johnson v. Nordstrom-Larpenteur Agency, Inc.*, 623 F.2d 1279 (8th Cir. 1980). This should put an end to what always has been a case involving pure issues of fact, not law.

Respondent is a commercial and personal lines insurance agency with separate and administratively autonomous offices throughout the country. Its operations can be viewed in terms of "sales" and "marketing" concepts. "Sales" refers to efforts made in contacting and selling insurance to clients or customers who need particular coverage. "Marketing" refers to efforts made in placing an existing or prospective sale with an insurance company willing to underwrite the risk.[2]

On June 19, 1972, petitioner was hired into respondent's Kansas City office as a "sales assistant." She remained in that office until April 10, 1975 when she was terminated. The lower courts have properly recognized that petitioner's claims can best be analyzed by dividing this total period of employment into two distinct periods, namely, June 19, 1972 to November 1, 1974 and November 1, 1974 through April 10, 1975.

Between June 19, 1972 and November 1, 1974, petitioner was shifted between the positions of "sales assistant" and "marketing assistant." During this period of time, the "marketing" function in the Kansas City office was coordinated by Marketing Manager Roy Wolfe.[3] The essence of petitioner's argument before the EEOC, the District Court and the Eighth Circuit was that between June 19, 1972 and November 1, 1974 respondent discriminated

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[2]See the District Court decision, 23 F.E.P. Cases at 275, Finding of Fact 5; Petition for Writ, All.

[3]This separate Statement of the Case is provided, in part, because of petitioner's repeated claims that she did equal work to that performed by Wolfe. Though petitioner asserts that she performed "essentially parallel marketing operations" while working "alongside" Wolfe and that she was "instrumental in the development" of agency relationships (Petition for Writ, p. 4), the District Court found exactly the opposite. See 23 F.E.P. Cases at 275-76 (Finding of Fact 6) and at 277-78 (Finding of Fact 14); Petition for Writ, A16-17.

against her under Title VII and the Equal Pay Act by not paying her the same amount as Marketing Manager Wolfe. See Petition for Writ, p. 4. Petitioner's arguments relating to this time period were limited to this "equal pay for equal work" approach.

On November 1, 1974, respondent implemented a restructuring and reorganization of its corporate "marketing" function. Marketing Manager Wolfe was transferred to Dallas and took with him the majority of the responsibilities which he had assumed while working in the same Kansas City office as petitioner.[4] Wolfe's departure from the Kansas City office resulted in an opportunity for petitioner. On a probationary basis, she assumed certain marketing responsibilities which were greater than her prior responsibilities but which remained significantly less than those which Wolfe had handled prior to his transfer. Accordingly, between November 1, 1974 and April 10, 1975, the date of petitioner's termination, petitioner's performance could not be analyzed under Equal Pay Act considerations because she had no alleged male counterpart in the office and was not, in the District Court's view, a successor to Wolfe in terms of job skill, effort and responsibility.[5]

However, looking to broader principles under Title VII, the District Court next assessed the evidence relating to petitioner's rate of pay following her promotion. Relying upon evidence introduced by petitioner, the District Court found that she was regarded as a probationary replace-

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[4]See 23 F.E.P. Cases at 278, Findings of Fact 16-17; Petition for Writ, A17-19.

[5]See 23 F.E.P. Cases at 279, Finding of Fact 24; Petition for Writ, A21.

ment for Wolfe but was not paid as such.[6] Thus, though it concluded that Equal Pay Act recovery for the period of time subsequent to November 1, 1974 was not justified by the evidence, the District Court found that Title VII had been violated. Noting that damages were difficult to measure, the District Court, in a determination highly favorable to petitioner, allowed her damages on the basis of what departed Marketing Manager Wolfe had been earning.[7]

On April 10, 1975, petitioner was terminated. The District Court found that the termination was warranted and nondiscriminatory.[8]

II.

ARGUMENT

Petitioner's contention that her present claims are cognizable under the considerations governing review on certiorari set forth in Rule 17 of the Rules of this Court is refuted by the facts and the law upon which petitioner purports to rely. No issue presented by this case reveals a conflict between or among the federal courts of appeal,

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[6]See 23 F.E.P. Cases at 278-79, Findings of Fact 18-22; Petition for Writ, A19-21.

[7]Damages were difficult to measure because of the findings that petitioner's job responsibilities subsequent to November 1, 1974 were significantly less than those previously held by Wolfe. Rather than selecting some arbitrary figure between petitioner's salary and that paid to Wolfe, which figure might have been more closely related to petitioner's actual responsibilities, the District Court provided petitioner the maximum relief possible by basing damages on Wolfe's salary. Since petitioner now makes reference to a Gregory Galvin as an individual in respondent's Minneapolis office who could be compared with petitioner, it should be noted that the District Court measured petitioner's damages against Wolfe's $20,800 salary, not Galvin's $17,004 salary.

[8]See 23 F.E.P. Cases at 279-81, Findings of Fact 25-30; Petition for Writ, A21-27.

nor does any issue raise an important question of federal law which has not been, but should be, settled by this Court.

A. Petitioner's Primary Argument, That Title VII Is Broader Than the Equal Pay Act And Permits a Finding of Discrimination in Compensation Based Upon Evidence Other Than Equal Pay Act Standards, Was Acknowledged by the District Court and Confirmed by the Eighth Circuit, Consistent with the Decisions in Other Circuits, and Thus Raises No Certworthy Issue.

Petitioner's primary argument appears to be that both the District Court and the Eighth Circuit somehow have implicitly ruled that recovery under Title VII on wage discrepancy allegations is not possible unless there is co-existing recovery under the Equal Pay Act. However, an impartial reading of the two decisions confirms that petitioner's argument is just plain wrong.

The District Court did decide that petitioner was entitled to no recovery under Equal Pay Act criteria. More particularly, it found that petitioner's employment with respondent never incorporated job duties which were substantially equal to any appropriately considered male counterpart in terms of skill, effort and responsibility. The District Court's findings were comprehensive and specifically related to different periods of time, and included an express finding that between June 19, 1972 and November 1, 1974, when there was a male Marketing

Manager in respondent's Kansas City office, there was no substantial equality in skill, effort and responsibility.[9]

The District Court's denial of Title VII recovery between June 19, 1972 and November 1, 1974 was affirmed by the Eighth Circuit because petitioner had claimed and attempted to prove only that she was not given equal pay for equal work. As to that, the evidence established that petitioner did not perform "equal work" with any alleged male counterpart during this period of time. As noted by the Eighth Circuit:

> The third issue raised on appeal is the district court's failing to find that appellant was discriminated against from June 19, 1972, until November 1, 1974, under Title VII of the Civil Rights Act of 1964. Appellant argues that during this period her job duties were substantially similar to Wolfe's and that they actually performed the same work. The district court found that between June of 1972 and November of 1974 the responsibilities imposed upon and performed by appellant were substantially less than those of Wolfe and that he was paid a greater salary because his experience, training, education and job responsibilities far exceeded hers. The court's findings concerning the substantial disparity of job qualifications and responsibilities are not clearly erroneous.

Johnson v. Nordstrom-Larpenteur Agency, Inc., 623 F.2d 1279, 1281 (8th Cir. 1980) (Petition for Writ, A5).

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[9]See 23 F.E.P. Cases at 275-78, Findings of Fact 5-13 (Petition for Writ, A11-16), for the District Court's comprehensive analysis of the educational backgrounds, relevant work experience and actual job duties of petitioner and those with whom she could properly compare herself during this period of time.

Neither the District Court nor the Eighth Circuit concluded, implicitly or explicitly, that there can be no Title VII recovery for disparate compensation absent recovery under the Equal Pay Act. Rather, both courts construed the Acts together in reviewing petitioner's "equal pay for equal work" claims. For the period prior to November 1, 1974, petitioner submitted no evidence of discrimination beyond this "equal pay for equal work" approach, and thus, neither lower court had any reason to expand its review to broader Title VII concepts.

Once the evidence was expanded beyond the "equal pay for equal work" approach, relating to events after November 1, 1974, broader Title VII review in fact was undertaken. The District Court found that after November 1, 1974, petitioner's Kansas City office did not incorporate a marketing position which, under Equal Pay Act criteria, could be deemed to be a consecutively held position with that previously held by Marketing Manager Wolfe. This finding, based upon a thorough analysis of petitioner's new job as opposed to that previously held by Wolfe, properly led to the denial of recovery under the Equal Pay Act for the period November 1 ,1974 to April 10, 1975.[10]

After determining that there could be no recovery under the Equal Pay Act because there was no "equal work," the District Court turned to the broader review available under Title VII and analyzed the evidence relating to respondent's handling of petitioner's promotion. Pointing to factors such as internal memoranda generated by respondent, as well as the manner in which respondent held petitioner out in her community as a probationary replace-

[10]See 23 F.E.P. Cases at 278-79, Findings of Fact 17, 24; Petition for Writ, A18-19, 21.

ment for Marketing Manager Wolfe, the District Court found that even though Equal Pay Act criteria had not been satisfied, the discrepancy between petitioner's pay after November 1, 1974 and Marketing Manager Wolfe's pay before that date was unduly excessive and, at least in part, attributable to her sex.[11] The District Court concluded that Title VII had been violated for the period from November 1, 1974 to April 10, 1975.[12]

In support of her contention that this matter is certworthy under considerations set forth in Rule 17(a) of the Rules of this Court, petitioner erroneously asserts that the circuit courts of appeal are in conflict on the issue supposedly presented here, i.e., the relationship between Title VII and the Equal Pay Act concerning allegations of discriminatory compensation practices. Even if this issue were presented by the lower court's decisions here, which, as noted above, it is not, the alleged "conflict" does not exist.

Petitioner claims that the Fifth, Eighth and Tenth Circuit Courts of Appeal have differed from the Third and Ninth Circuits. Citing *I.U.E. v. Westinghouse Electric Corp.*, 23 F.E.P. Cases 588 (3d Cir. 1980), and *Gunther v. County of Washington*, 602 F.2d 882 (9th Cir. 1979), *rehearing denied*, 22 F.E.P. Cases 1650 (1980), she argues that the Third and Ninth Circuits have read Title VII to provide broader opportunities for relief than the Equal Pay Act on the issue of discriminatory compensation. In an effort to establish a conflict among the circuits, petitioner then erroneously contends that the Fifth, Eighth

[11]See 23 F.E.P. Cases at 278-79, Findings of Fact 18-22; Petition for Writ, A19-21.

[12]See 23 F.E.P. Cass at 283, Conclusion of Law 4; Petition for Writ, A32.

and Tenth Circuits limit Title VII recovery for discriminatory compensation to those situations where recovery is allowable under the Equal Pay Act. However, looking at the very cases upon which petitioner relies, it becomes quickly apparent that there exists no conflict among the circuits concerning the interrelationship of the Equal Pay Act and Title VII. Petitioner is comparing apples with oranges.

In *Gunther v. County of Washington, supra,* the Ninth Circuit was confronted with claims which were broader than mere claims of denial of equal pay for equal work. The claim in *Gunther* was that even if the work were not substantially equal, there should have been an opportunity to prove that wage discrepancies were at least partially attributable to sex discrimination. This is precisely what the District Court allowed in the instant case. As to any alleged conflict among the circuits, the *Gunther* decision clearly distinguishes the considerations present there from those present in the decisions of other circuits. In referring to decisions rendered by the Fifth and Eighth Circuits, the Ninth Circuit stated:

> The cases considering the relationship between Title VII and the Equal Pay Act have involved claims that females were being denied equal pay for equal work. *See, e.g., DiSalvo,* 568 F.2d 593; *Orr v. MacNeill,* 5 Cir., 511 F.2d 166. Quite properly, these cases have construed the two statutes harmoniously; any other approach may have produced different results depending on whether a plaintiff labeled his cause of action as being brought under "Title VII" or under the "Equal Pay Act."[13]

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[13]The *DiSalvo* decision is cited more fully as *DiSalvo v. Chamber of Commerce of Greater Kansas City,* 568 F.2d 593 (8th Cir. 1978). The *Orr* decision is more fully cited as *Orr v. Frank R. MacNeill & Son, Inc.,* 511 F.2d 166 (5th Cir.), *cert. denied,* 423 U.S. 865 (1975).

Gunther v. County of Washington, 602 F.2d at 888.

Petitioner's "apples and oranges" comparison is further exposed by *Gunther's* reference to the trial court's decision in *I.U.E. v. Westinghouse Electric Corp.*, 19 F.E.P. Cases 450 (D.N.J. 1979) (reversed by the Ninth Circuit and discussed below). The *Gunther* court commented as follows:

> The general rule stated in the cases cited in *IUE*—that Title VII equal pay claims should be judged under Equal Pay standards—is compatible with the view we have taken. Those cases, however, did not consider the issue whether Title VII prohibits conduct outside the scope of the Equal Pay Act, and we see no reason to extend the rationale of those cases to a significantly different issue which they did not address.

Gunther v. County of Washington, 602 F.2d at 891.

The second decision relied upon by petitioner, *I.U.E. v. Westinghouse Electric Corp.*, 23 F.E.P. Cases 588 (3d Cir. 1980), likewise confirms that there is no conflict among the circuits on the issue of whether Title VII can be deemed to provide broader opportunity for relief than the Equal Pay Act. There the Third Circuit, in considering this issue, concluded that except for *Gunther*, other circuit and district court decisions were not helpful because they did not decide the same issue. *I.U.E. v. Westinghouse Electric Corp.*, 23 F.E.P. Cases at 598. The very cases cited by the Third Circuit as not deciding the same issue[14] include some of the cases erroneously relied

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[14] *DiSalvo v. Chamber of Commerce of Greater Kansas City*, 568 F.2d 593, 596 (8th Cir. 1978); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 446 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978); *Man-*

upon by petitioner here in her effort to create a conflict where none exists.

Supreme Court Rule 17(a) provides that an issue might be deemed certworthy if a federal circuit court has rendered a decision in conflict with a decision of another circuit court *on the same matter*. Here petitioner has pulled issues out of *Gunther* and *I.U.E.* which do not exist in the decisions petitioner claims are in conflict. There of course is nothing certworthy about different circuit courts, or for that matter the same circuit court, reaching different results on different issues.

In addition to alleging that a conflict exists among the circuits, petitioner argues that the Eighth Circuit in the instant case implicitly decided that recovery under Title VII is not possible absent recovery under the Equal Pay Act. Again, there is no such finding. The Eighth Circuit simply held, as it should have, that the District Court's detailed findings were not clearly erroneous. It decided no important question of federal law which has not been, but should be, decided by this Court, as contemplated by Rule 17(c). The District Court found that Title VII and the Equal Pay Act should be construed harmoniously with respect to "equal pay for equal work" claims, but that Title VII allows recovery even without findings of equal work if wage discrepancies are due, at least in part, to considerations of sex. The Eighth Circuit affirmed these findings under the proper standard of review. No important legal issue remains to be settled.

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hart v. City of Los Angeles Dept. of Power & Water, 553 F.2d 581, 587-88 (9th Cir. 1976), *aff'd in part and rev'd in part on other grounds*, 435 U.S. 702 (1978); *Orr v. Frank R. MacNeill & Son, Inc.*, 511 F.2d 166, 171 (5th Cir.), *cert. denied*, 423 U.S. 865 (1975).

B. Petitoner's Argument Concerning the Proper "Establishment" for Equal Pay Act Application Is a Pure Fact Argument Which Involves No Important Question of Federal Law, and Thus Raises No Certworthy Issue.

Petitioner asserts that the determination of what properly constitutes a separate "establishment" for purposes of Equal Pay Act application is an important question of federal law which has not been, but should be, decided by this Court. However, there is no attempt to show that the uniformly acknowledged criteria for "establishment" analysis are in any way under attack or at issue here. Instead, petitioner simply contends that these criteria, when applied to petitioner's version of the facts, should have caused the District Court to conclude that respondent's nationwide system of separate and autonomous offices nevertheless is a single "establishment." This presents no certworthy issue of law, but rather is pure fact argument.

The case law cited by petitioner emphasizes that centralization of administrative processes, interchange of employees and use of the same premises are, among others, factors to be addressed in determining what constitutes a separate "establishment."[15] We do not quarrel with these factors, but we do emphasize that they are to be applied to the particular circumstances of each case. Petitioner has cited a few cases which found, upon application of the proper criteria, that the "establishment" included more than one location. In the instant case, however, application of these criteria resulted in a determination that re-

[15]See Petition for Writ, pp. 21-23.

spondent's Kansas City office is a separate "establishment."[16]

There is no important question of federal law here at all, let alone one which has not been, but should be, decided by this Court. Petitioner's fact arguments already have been determined below.

C. Petitioner's Recurring Demand for Recovery of Costs Raises No Certworthy Issue.

Petitioner's final argument is that an important question of federal law has been created by the Eighth Circuit's determination that the District Court's denial of costs in this action was not an abuse of discretion. *Johnson v. Nordstrom-Larpenteur Agency, Inc.*, 623 F.2d at 1282. Though labeled as an important question of federal law, this is but another request for review of the facts relevant to the District Court's discretionary denial of out-of-pocket costs to both sides.[17]

A trial court has broad discretion in taxing costs where each of the parties has prevailed on one or more of its claims, defenses or counterclaims. *Cornwell Quality Tools Co. v. C.T.S. Co.*, 446 F.2d 825, 833 (9th Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972). This law was specifically acknowledged by the Eighth Circuit here. *Johnson v. Nordstrom-Larpenteur Agency, Inc.*, 623 F.2d 1279, 1282 (8th Cir. 1980).

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[16]See 23 F.E.P. Cases at 279, Finding of Fact 23; Petition for Writ, A21.

[17]Note that the Eighth Circuit did remand the issue of attorneys' fees to the District Court for determination, on the theory that plaintiff could be deemed to have prevailed partially on her claims. Respondent has not sought review by this Court of that decision, though we believe the District Court quite properly denied petitioner's claim for fees. Thus, the only matter now at issue is petitioner's claim for other miscellaneous costs of litigation.

Petitioner does not ask this Court to consider whether the "abuse of discretion" standard is unduly broad when applied to the goals and remedial purposes of Title VII, but rather simply quotes general authority on the costs issue and urges this Court to reach a different determination on the facts. Petitioner's request does not raise a certworthy question.

III.

CONCLUSION

The petition should be denied because none of the questions presented is certworthy.

Dated: November 14, 1980.

Respectfully submitted,

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